

Present:

Mr. Justice Mohammad Bazlur Rahman
and
Mr. Justice Md. Ruhul Quddus

Customs Appeal No. 88 of 2008

Bureau Veritas (BIVAC) Bangladesh Ltd.

... Appellant

-Versus-

Customs Excise and Vat Appellate Tribunal, Dhaka and
others

... Respondents

Mr. M. A. Azim Khair with Mr. Md. Iqbal Hossain,
Advocates

... for the appellant

Mr. Gautam Kumar Roy, Deputy Attorney General with
Mr. Pratikar Chakma, Assistant Attorney General

í for the respondent

Judgment on 24.04.2013

Md. Ruhul Quddus, J:

This appeal under section 196D of the Customs Act, 1969 at the instance of Bureau Veritas, a pre-shipment inspection agent was preferred against judgment and order dated 15.07.2008 passed by the Customs, Excise and VAT Appellate Tribunal, Dhaka in Appeal No. CEVT/Case/(CUS)-293/2003 dismissing the same and affirming order No.80 dated 26.01.2003 passed by the Commissioner of Customs, Chittagong imposing penalty upon the appellant for certification of 14,809,000 K.Gs of polyester yarn allegedly under wrong H. S. Code.

Facts giving rise to the appeal, in brief, are that the proforma-respondent Farid International imported 14,809,000 KGs of polyester yarn from Korea by opening a letter of credit through Janata Bank Ltd. The appellant was appointed as pre-shipment inspection agent, which had inspected the goods before shipment and

issued a clean report of finding (CRF) certificate being No.BDH 2001 269-IC dated 15.03.2001. After arrival of the goods at Chittagong port, the importer submitted bill of entry on 04.04.2001 for releasing the same, but the Customs authority raised objection to classification of the goods under H. S. Code No. 5402.43.00 on the ground that the imported goods actually were High Tenacity Polyester Filament Yarn to be classified under H.S. Code No.5402.20.90.

Subsequently the Customs Authority by a letter dated 15.07.2001 asked the pre-shipment inspection agent to show cause as to why action should not be taken against it for certifying wrong H. S. Code against the imported goods. The appellant by letter dated 27.09.2001 accompanied by a analysis report replied the show cause notice stating, *inter alia*, that the goods were not "High Tenacity Polyester" but "Single Yarn Untwisted Polyester" and were rightly classified under H. S. Code No. 5402.43.00. The Commissioner of Customs, Chittagong after hearing the parties passed order No. 80 dated 26.01.2003 holding the pre-shipment inspection agent liable for wrong classification of the goods and imposed penalty of Taka 50,000/- to be paid within 30 (thirty) days from the date of service of the order.

Being aggrieved by the said order dated 26.01.2003 the appellant preferred an appeal before the Customs, Excise and VAT Appellate Tribunal on the grounds taken therein. The Appellate Tribunal after hearing the parties dismissed the appeal by the impugned judgment and order dated 15.07.2008 affirming the original order of the Commissioner of Customs, Chittagong. The appellant preferred the instant Customs Appeal against the said order of the Appellate Tribunal.

Mr. M. A. Azim Khair, learned Advocate appearing for the appellant submits that the reply made by the appellant in response to the show cause notice

was not considered by the Commissioner of Customs. According to the analysis report that was attached with the reply, it is clear that the goods imported were Single Yarn Untwisted Polyesters of less than 60 tenacity and therefore, the imported goods cannot be classified as High Tenacity Polyester Yarn. The Appellate Tribunal without considering the materials on record and making any independent discussion thereon passed the impugned judgment, which is not tenable in law and is liable to be set aside.

On the other hand, Mr. Gautam Kumar Roy, learned Deputy Attorney General appearing for the respondent submits that in the present case as many as two show cause notices were served upon the appellant and it is apparent on the face of the CRF certificate that the commercial description of the imported goods has been mentioned as High Tenacity Polyester Filament Yarn and, therefore, there is no scope to argue that according to analysis report, the goods do not fall under the category of High Tenacity Polyester Filament Yarn without amending the CRF certificate. The classification of the goods under wrong H. S. Code caused loss of revenue to the Government and as such the Commissioner of Customs rightly imposed penalty upon the appellant. In the ordering portion of the impugned judgment, it is shown that the Customs authority and the Appellate Tribunal below considered the materials on record as well as the reply made by the appellant. There is no reason to interfere with the finding of the lower Appellate Tribunal sitting virtually on a second appeal, he concludes.

It appears from clause 6 of the show cause notice dated 15.07.2001 that another notice dated 23.05.2001 was served upon the pre-shipment inspection agent. In response to the earlier notice, it made a reply dated 03.6.2001 asserting the H. S. Code to be correctly certified. Ground *uma* (0) of the memo of appeal

before the lower Appellate Tribunal as well as the Commissioner's order show that before service of the first notice, there was a chemical test of the imported goods by the Customs authority and a test report was available before the Commissioner.

The Commissioner of Customs considered both the test reports, but relied on the report obtained on chemical test by the Customs authority and discarded the report accompanied with the reply made by the appellant. The Commissioner gave reasons of his findings in a precise manner, for better appreciation, the relevant portion of which is quoted below:

00 Dc 3 Avg`wb Pvj i mAviGd cZ`vqb cxi 16 b`j Kvj cxi eYvq Ges Bbfm, c`vks wj o eYvq High Tenacity Polyester Filament Yarn vKv mI mAviGd mbx GBP Gm, W 54024300 cZ`vqb Kiv n|x|

...

0 eji vvi Uvm(ers) wj t Gi cZ`vba Rbve muj vDwi b mivxi e³e" gkvM mnKv k`eb Ges bw_x i v|Z `wj j cI chPvPbv Kiv nj | D³ cZ`vxi cZ`vba cxi eYv Ges GBP.Gm. W mWK Avx e`vex Kxb | %vM cZ`vxi `vLj K v w wi xU`h_vh_ bq| vZy wmsMvj Bqv`Avg`vbx `wj j Gi v vlv bvB Ges High Tenacity Polyester Filament Yarn D`L Kiv Avx Ges GKB eYvq cb` i mvqbk cixvq 100% High Tenacity Polyester Filament Yarn cvl qv vMqv | vnmv Avf vM cZ`vxi Rb` mRbK bq| Avg`vbx Kvi K i e KZv | KZvba i Z GBP.Gm. vW G i e Kiw` cwi vva ceR gvj vgj Lvj vm wvxb | GZ wc.Gm.AvB v`vbx i wei, x AvbxZ Avf vM m`vZxZfvx cgvbZ n|x| (emphasis supplied)

We have also examined the reply dated 27.09.2001 given by the appellant in response to the second show cause notice as well as the reply dated 03.06.2001 given in response to the first show cause notice. In both the replies, the pre-shipment inspection agent claimed its CRF certificate to be correctly issued. In the

CRF certificate, the commercial description of the goods has been mentioned as *“Synthetic Filament Yarn” “Palmylon” Brand 420D/96F/1 Bright Raw White High Tenacity Polyester Filament Yarn on Uneven Packing*, and the goods have been classified under H.S Code No.5402.43.00. The commercial description of the imported goods corresponds to the sub-heading *“High tenacity yarn of polyesters”* of H. S. Code No.5402.20.90, but does not correspond to the sub-heading *“Other yarn, single, untwisted or with a twist not exceeding 50 turns per meter”* of the H. S. Code in question. The quoted portion of the CRF certificate was not amended before or after giving the reply. Without any such amendment, it is difficult to accept the appellant’s contention that the goods would fall under H.S Code No.5402.43.00. Moreover, no letter of credit, invoice, packing list etc. have been brought into record to controvert the finding of the Commissioner of Customs that *“100% High Tenacity Polyester Filament Yarn”* is the correct description of the goods. The appellant has not brought any evidence to support its contention that the goods are *“100% High Tenacity Polyester Filament Yarn”*.

It needs to mention that the record of this case was called for from the lower Appellate Tribunal, on arrival of which the paper books were prepared. But the original record from the Commissioner of Customs, Chittagong was not called for. During pendency of the appeal the appellant did not take any step for calling the original record and incorporate the same in the paper books, nor did it take any step to bring the letter of credit, invoice, packing list etc. in the record in any manner approved by law.

A particular H. S. Code always corresponds to the description of a particular good. If the H.S. Code is wrongly certified, the description of the good would also be wrong. The appellant, nowhere in its reply, made any statement that the above

quoted commercial description of the goods was wrongly mentioned in the CRF certificate or that they had amended the CRF certificate with correct commercial description. Therefore, without amending the commercial description of the goods as mentioned in the CRF certificate, there is no scope to argue that the allegation of wrong certification of the H.S. Code was satisfactorily replied. The importer Farid International (herein proforma-respondent) already released the goods on payment of taxes and duties on the basis of H. S. Code No. 5402.20.90 without raising any objection. This is also an important aspect, which speaks against the appellant.

Although the lower Appellate Tribunal did not assign any reason as to why it did not accept the explanation given by the appellant and make any discussion on the analysis report, we, sitting in a second phase of appeal, are not inclined to send the case on remand only for independent consideration of the reply and report after so long period, when the adjudicating authority of first instance already considered the same and the lower Appellate Tribunal concurred the findings.

For all the reasons stated above we do not find any merit in the appeal. Accordingly, this customs appeal is dismissed.

Communicate a copy of this judgment and send down the records.

Mohammad Bazlur Rahman, J:

I agree.